

PUBLIC VERSION

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH
TELECOMMUNICATIONS, LLC
d/b/a AT&T NORTH CAROLINA and
d/b/a AT&T SOUTH CAROLINA,

Complainant,

v.

DUKE ENERGY PROGRESS, LLC,

Defendant.

Proceeding No. 20-293
Bureau ID No. EB-20-MD-004

**REPLY IN FURTHER SUPPORT OF THE APPLICATION FOR REVIEW
FILED BY BELLSOUTH TELECOMMUNICATIONS, LLC
d/b/a AT&T NORTH CAROLINA AND d/b/a AT&T SOUTH CAROLINA**

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Date: November 15, 2021

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I. Introduction and Summary

Duke's arguments confirm that the Commission should review and revise the *Bureau Order*¹ so that it furthers its decade-long work to ensure competitive neutrality, reduce infrastructure costs, and promote broadband deployment. According to Duke, the *Bureau Order* sets pole attachment rates for AT&T "around \$[REDACTED]/pole" when AT&T's competitors pay Duke a "just, reasonable, and fully compensatory" new telecom rate averaging about \$[REDACTED].² Duke says it may collect this extraordinary annual premium from AT&T regardless of whether Duke incurred a single additional cost to justify it.³ And Duke misreads the *Bureau Order* to allow it to offset reductions to its unjust and unreasonable joint use agreement ("JUA") rates through increases to AT&T's operational costs.⁴ In other words, Duke reads the *Bureau Order* to effectively do nothing about the "higher rates [that] inhibit broadband deployment" and frustrate competition.⁵ The Commission should revise the *Bureau Order* so that it achieves its goals.

II. The Commission Should Eliminate the Rate Disparity Created by the *Bureau Order*.

Duke's arguments confirm the need for Commission review. *First*, Duke defends the *Bureau Order*'s reliance on immutable ILEC characteristics to rebut the presumption that ILECs are comparable to their competitors for purposes of pole attachment rates, arguing that the Commission found in 2018 that certain unchangeable ILEC characteristics (like access guaranteed by contract instead of statute) would rebut the presumption.⁶ But the sentence Duke

¹ Mem. Opinion and Order, Proceeding No. 20-293 (EB Sept. 21, 2021) ("*Bureau Order*").

² Opp'n to App. for Review at 24 (Nov. 5, 2021) ("Opp'n"); *see also Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd 5240, 5299 (¶ 137) (2011) ("*Pole Attachment Order*"); *Bureau Order* ¶ 6.

³ Opp'n at 17-19.

⁴ *Id.* at 23-25.

⁵ *See, e.g., In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd 7705, 7767 (¶ 123) (2018) ("*2018 Order*").

⁶ Duke also takes issue with a footnote in AT&T's Application for Review, which noted that the

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cites quotes *industry allegations* only.⁷ The Commission did not accept the allegations, but referred them to complaint proceedings for consideration based on an evidentiary record.⁸ By treating unproven and contested industry allegations as truth, the *Bureau Order* reduces the Commission's presumption to a nullity that can be rebutted *in every case* simply because an ILEC is an ILEC.

Second, Duke embraces the *Bureau Order*'s incomplete view of competitive neutrality, which compares only contract language and ignores relevant statutory and regulatory rights and responsibilities. Duke does not deny statutory and regulatory differences exist between AT&T and its competitors—or that they may competitively disadvantage AT&T. Instead, Duke argues that an incomplete analysis is justified by a background sentence in the Commission's *2018 Order* stating that “joint use agreements may provide benefits to the [ILECs] that are not typically found in pole attachment agreements between utilities and other telecommunications attachers.”⁹ But the Commission's *regulation* contains no such limitation; it does *not* refer to, let alone limit the comparative analysis to, contractual terms in CLEC and cable television license agreements. For good reason: reviewing only a subset of market conditions cannot ensure the competitive neutrality the Commission's deployment and competition goals require.

Third, Duke fails to address head-on the *Bureau Order*'s failure to hold Duke to its burden to justify charging AT&T more than its competitors with evidence of net material competitive advantages.¹⁰ Instead, Duke simply repeats prior arguments the *Bureau Order*

new telecom rate presumption should have applied to the entire proceeding. *See* Opp'n at 1-3. Duke's argument, while wrong, is academic because its rates are unjust and unreasonable under the new telecom rate presumption *and* the standard that preceded it. *See Bureau Order* ¶ 8.

⁷ Opp'n at 3-4 (citing the *2018 Order*'s quoted allegations from Comcast and electric utilities).

⁸ *See 2018 Order*, 33 FCC Rcd at 7771 (¶ 128); *see also* 47 C.F.R. § 1.1413(b).

⁹ Opp'n at 5-6 & n.17 (quoting *2018 Order*, 33 FCC Rcd at 7768 (¶ 124)).

¹⁰ *See* 47 C.F.R. § 1.1413(b); *see also Bureau Order* ¶ 43 & n.143 (describing Duke's burden to

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correctly rejected. For example, Duke continues to press its claim that AT&T is materially advantaged because it would cost AT&T more (by Duke's estimation, \$ [REDACTED] more per pole per year) to build a needlessly redundant pole network.¹¹ Duke also claims AT&T is advantaged by per-pole rates that charge for excess pole space AT&T does *not* use¹² even though the Commission has repeatedly held that AT&T's competitors are guaranteed per-pole rates that charge only for the space they *actually* occupy.¹³ Duke insists there is a difference between "tabulated" and "actual" pole replacement costs even though it failed to prove a "cost advantage" from the use of "tabulated" costs, which the JUA says reflect "the cost" to perform the work.¹⁴ Duke also points to permitting, engineering, and inspection costs AT&T incurs by performing the work itself and to the typical location of AT&T's facilities about one foot below AT&T's competitors' facilities—a fact that cannot impose any additional cost on Duke.¹⁵ That the *Bureau Order* found the presumption rebutted even though Duke is unable to quantify a single cost it incurs because of the identified advantages shows why further review is needed: Duke failed to prove any net *material* competitive advantages as required.¹⁶

justify a rate higher than the new telecom rate under the 2011 *Pole Attachment Order*).

¹¹ See Opp'n at 9; see also *Bureau Order* ¶ 44 ("The Commission has never condoned valuing an alleged advantage by assuming ... an [I]LEC would have built a duplicate pole network").

¹² See Opp'n at 9-11; see also *Bureau Order* ¶ 46 ("Duke has not shown that AT&T actually occupies more than one foot of space").

¹³ The Commission has repeatedly held that just and reasonable rates are per-pole rates based on space *occupied*. Opp'n to Pet'n for Recon. at 12-14 (Nov. 1, 2021) (citing cases); see also 47 C.F.R. § 1.1406(d) (calculating rates based on space occupied, not the number of attachments); *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12122 (¶ 31) (2001) (FCC rate formulas "determine the maximum just and reasonable rate *per pole*") (emphasis added).

¹⁴ *Bureau Order* ¶¶ 26, 46; Compl. Ex. 1 at ATT00096-100 (JUA, Art. VII).

¹⁵ Opp'n at 13-17. But see *Bureau Order* ¶¶ 34, 46.

¹⁶ 47 C.F.R. § 1.1413(b); *Bureau Order* ¶ 43 (Duke's "attempts to calculate the monetary value of the advantages ... [we]re speculative and unsupported by reliable evidence."); see also *Verizon Va. v. Va. Elec. and Power Co.*, 32 FCC Rcd 3750, 3759 (¶ 18) (EB 2017) (a pole owner

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Fourth, Duke's opposition confirms the need to again clarify the Commission's cost-causer approach to pole attachment rates, as Duke reads the *Bureau Order* to give Duke—the party with a nearly 5-to-1 pole ownership advantage—a unilateral right to demand payment of the old telecom rate regardless of whether Duke has incurred any relevant costs that would justify it.¹⁷ But the Commission requires cost-based rates to counteract such an exercise of bargaining power.¹⁸ And so it adopted the old telecom rate as an *upper bound* on ILEC rates—not an automatically applied rate or even a presumptive rate—and expected electric utilities would charge rates that “account for” the value of any proven net material competitive advantages.¹⁹ Duke's effort to jump straight to the old telecom rate irrespective of its costs would embed, instead of eliminate, the “artificial, non-cost-based differences” in pole attachment rates that “are bound to distort competition” and frustrate the Commission's deployment goals.²⁰

Finally, Duke does not dispute that the *Bureau Order* fails to divide the unusable space on a pole equally “among *all* attaching entities” as required by 47 U.S.C. § 224(e) when it lets Duke use a unique average number of attaching entities input to calculate rates for AT&T () as compared to AT&T's competitors on the same poles (5).²¹ Instead, Duke argues that it *should* be able to use a unique input to inflate the old telecom rate it calculates for AT&T because the

may not recover “costs that [it] does not incur”); *Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 182) (There is “no evidence [of] any category or type of costs that are caused by the attacher that are not recovered through the new telecom rate.”).

¹⁷ Opp'n at 17-19; *id.* at 19 (“[Duke] is under no legal burden to quantify the costs it incurs under the JUA.”). Duke argues alternatively that it quantified relevant costs, *see* Opp'n at 19-21, but the *Bureau Order* correctly rejected each of its valuation attempts as “speculative and unsupported by reliable evidence,” *Bureau Order* ¶ 43.

¹⁸ *See Cost Allocator Order*, 30 FCC Rcd at 13744-45 (¶ 29).

¹⁹ *See 2018 Order*, 33 FCC Rcd at 7770-71 (¶¶ 128-129); *Pole Attachment Order*, 26 FCC Rcd at 5336-37 (¶ 218).

²⁰ *See AEP v. FCC*, 708 F.3d 183, 190 (D.C. Cir. 2013).

²¹ 47 U.S.C. § 224(e)(2) (emphasis added); *see also* App for Review at 19-20.

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Commission fixed the “loophole” in the new telecom rate formula that previously let Duke inflate rates for AT&T’s competitors.²² In other words, Duke wants to make up for lost revenue from AT&T’s competitors by artificially increasing AT&T’s rates. This confirms the Commission *should* correct the *Bureau Order* and require Duke to use the same competitively neutral presumptive input (5 attaching entities) to calculate rates for AT&T and for AT&T’s competitors on the same poles.

III. The Commission Should Clarify that a New Joint Use Agreement Is Not Required.

The Commission does not have authority to order a wholesale revision of the JUA,²³ and does not have a reason to do so because this case determines the rate for *this* JUA.²⁴ Instead, the parties need only conform the JUA’s rate provision to the Commission’s order. Duke confirms that this must be expressly stated, as it announces an intention to exploit the *Bureau Order*’s ambiguity and its superior bargaining power to try to force AT&T to negotiate a new JUA with costlier operational terms to offset the required rate reductions.²⁵ The Commission should cut off this blatant attempt to evade the Commission’s rate reforms. And, to preclude further delay and gamesmanship, the Commission should require a joint report in 30 days confirming Duke’s compliance with its order and its payment of the refunds it unlawfully collected, with interest.²⁶

The Commission should revise and clarify the *Bureau Order* as requested in AT&T’s Application for Review to further its competition and deployment goals.

²² Opp’n at 22 (“[I]f the AAE still mattered for purposes of calculating the New Telecom Rate, [Duke] would most certainly use the actual AAE rather than a presumptive value.”).

²³ 47 C.F.R. § 1.1407(a)(2).

²⁴ *Verizon Md. LLC v. The Potomac Edison Co.*, 35 FCC Rcd 13607, 13618 (¶ 28) (2020) (There is “no requirement” to terminate a JUA and enter a new one to obtain just and reasonable rates).

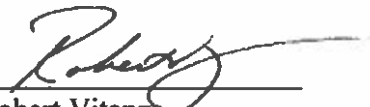
²⁵ Opp’n at 24 (“To put it bluntly, if the most [Duke] can charge AT&T is around \$■■/pole, then some of the ‘goodies’ in the JUA ... must come out.”).

²⁶ The need for oversight is apparent from Duke’s claim that it never needs to voluntarily comply with the just and reasonable rate requirement of federal law. See Opp’n at 1.

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Dated: November 15, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2021, I caused a copy of the foregoing Reply in Further Support of the Application for Review Filed by BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina to be served on the following (service method indicated):

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